

EXHIBIT B

Dlozwhis

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

3 UNITED STATES OF AMERICA, New York, N.Y.

4 v. 12 CR 125 (JSR)

5 DOUG WHITMAN,
6 Defendant.

7 -----x

8
9 January 24, 2013
3:20 p.m.

10 Before:

11 HON. JED S. RAKOFF,
12 District Judge

13
14 APPEARANCES

15 PREET BHARARA
16 United States Attorney for the
Southern District of New York
17 BY: CHRISTOPHER LAVIGNE
JILLIAN BERMAN
Assistant United States Attorneys

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19 SIDLEY AUSTIN LLP
Attorneys for Defendant
20 BY: DAVID ANDERSON
DAVID RODY
MICHAEL D. MANN

21 Also Present: Constantine Voulgaris, FBI
22 Jared Hoffman, Paralegal

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1 involved; true?

2 MR. RODY: Correct.

3 THE COURT: And so it wasn't -- I don't think it's
4 really the same as just saying broad denial. This was a highly
5 detailed denial.

6 MR. RODY: It was a denial of guilt by denying that he
7 understood at any time that the information he received and
8 traded on was inside information.

9 THE COURT: That is a fair statement.

10 So, I think he perjured himself. I think, frankly, he
11 repeatedly perjured himself. I thought the evidence was quite
12 overwhelming that this sophisticated defendant, whose own
13 company had a very detailed inside information prohibitory
14 policy, was willfully, blatantly aware that he was trading on
15 inside information every step of the way, in all the respects
16 found by the jury, and, in this Court's independent view, amply
17 supported by the evidence. And that his denials on the stand
18 were directly contradicted not only by the testimony, but in
19 some cases by highly specific information.

20 The government points to, for example, the
21 conversation with Roomy Khan where Mr. Whitman acknowledged
22 that Kahn had a "mole" at Google, which the Court finds meant
23 an insider who was breaching fiduciary duty and not this, in
24 this Court's view, preposterous attempt to redefine mole in an
25 innocent way. And that going back to the conversation, when

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1 Kahn said that she had lost the mole because she did not want
2 to pay the mole, Whitman said -- and this is reflected in
3 government exhibit 32T, the transcript of one of the
4 recordings, and I think he's at that point referencing
5 Mr. Wang's source at Cisco, "Roomy's view was that's illegal --
6 he then laughs. I said, Roomy, what you were getting from her
7 was illegal to start with, so now you're getting ethical, that
8 you shouldn't give her any cash? Buy her some nice present? I
9 mean, she didn't have enough sense to go out and buy herself a
10 nice present, right? I mean, let me ask you a question. I
11 have to assume the guy that you talked to from Cisco, who is
12 your buddy, that you give him a bucncn of nice wine every once
13 in a while, right?" And it continues in that vein. And that's
14 just one example of dozens.

15 So the court finds that Mr. Whitman gave testimony
16 that was materially and willfully false, and so the guideline
17 range will be increased by two points for obstruction.

18 And that leads to a guideline range of 53 to 63 -- 51
19 to 63 months. Now, why do I say that's irrelevant to my
20 sentence? For two reasons. First, I have very serious
21 misgivings about the policies underlying this particular
22 enhancement of the guidelines. The effect of this guideline is
23 to chill persons taking the stand. And while in this case Mr.
24 Whitman, the Court finds, did commit perjury, the effect of
25 this guideline is if someone who the government believes is

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1 guilty, but who is asserting their innocence, wishes to take
2 the stand and clear their name, they have to be advised by
3 their counsel that if the Judge does not believe the testimony,
4 finds it is willfully false by a preponderance of the evidence,
5 nevertheless, or clear -- excuse me -- clear and convincing
6 evidence, but not proved beyond a reasonable doubt, that they
7 will face a higher guideline range and, therefore presumptively
8 a higher sentence. It is one of several conditions in the
9 guidelines that make the guidelines among the many many many
10 other evils, an impediment to innocent people taking the stand
11 and clearing their name. And so as a policy matter, I find
12 this guideline very questionable.

13 But second and independent of that, the assessment of
14 Mr. Whitman's character would be the same whether that
15 guideline was in place or not. You're going to talk in a few
16 minutes about the good and the bad about Mr. Whitman's
17 character. There will be in the context of 3553(a) factors,
18 because here, as in so many other cases, I find that the
19 guidelines place far too much emphasis on the alleged monetary
20 gain and don't really address the more important aspects of
21 sentencing reflected in Section 3553(a), which is binding on
22 the Court. But the assessment of any defendant's character is
23 very important to this Court. It would go forward and it would
24 be assessed at punishment or non-punishment as the case may be,
25 meted out regardless of this particular guideline. So I

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1 appreciate counsel's debate about this issue. It was important
2 as part of my assessment of Mr. Whitman's character, but the
3 fact that the guideline range goes up as a result is irrelevant
4 to the sentence I will impose.

5 Now, let's talk about what sentence should be imposed
6 under Section 3553(a). And of course, again, I'm willing to
7 hear everything counsel has to say. I've been blessed with not
8 only excellent briefs from both sides, but numerous letters,
9 most of which were favorable to Mr. Whitman, one distinctly
10 unfavorable to Mr. Whitman from his estranged wife. But I'm
11 anxious to hear whatever counsel has to say here today as well.

12 So let me hear from defense counsel first, after then
13 from the government, then from the defendant if he wishes to be
14 heard.

15 MR. RODY: Thank you, Judge. Before I talk about Mr.
16 Whitman's character, we do have a lot of things to say about
17 that. Your Honor just mentioned that you thought the
18 guidelines placed too much emphasis on monetary gain. That's
19 one of our points.

20 THE COURT: Yes.

21 MR. RODY: We actually make it both under the
22 guidelines, under the application note to 2B1.1, as well as
23 under 3553.

24 THE COURT: Yes, thank you for reminding me of that.
25 Once again, complete irrelevancy to any sentence I impose, but

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1 I have to -- I'm required by law to make a finding. I do find
2 that the position taken by the probation officer as supported
3 by the government in that respect is persuasive, and so I
4 adhere to that position in the guideline calculation.

5 MR. RODY: We do still think that that amount of gain,
6 and the guidelines range it produces, is overstated in Mr.
7 Whitman's case.

8 THE COURT: Well, I think -- here's the point that,
9 and I'm happy to hear anything you want to say. If you're
10 asking me to change the guideline calculation under any of the
11 ways you can do that, you will be presumptively unsuccessful.
12 But if you want to convince me of the fact that the guidelines
13 here, as elsewhere, places too much emphasis, irrational
14 emphasis on the monetary portion of the determination of
15 sentence, you also would be wasting your breath. Because I'm
16 already convinced. I've said this in a dozen cases, and I see
17 no difference here. The guidelines are skewed irrationally in
18 this respect.

19 So what I really want to hear about is this -- so
20 maybe I should help both counsel out a little bit. I start
21 with certain assumptions, which you're free to convince me
22 otherwise. I start with the assumption that this was a very
23 serious set of crimes taken by someone who absolutely knew he
24 was doing wrong and who, therefore, deserves to be punished.
25 That's the, if you will, unjust punishment factor under the

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1 guidelines. That may be mitigated by the rest of his
2 character, which is something that the guidelines also requires
3 me to -- excuse me -- that Section 3553(a) -- if I said the
4 guidelines, I'm talking now about 3553(a) -- 3553(a) says there
5 has to be just punishment. 3553(a) says I have to take into
6 account not just the the offense, but the personal
7 characteristics of the defendant. Those are all very
8 important.

9 The 3553(a) also says you have to take into account
10 both specific deterrence and general deterrence. General
11 deterrence, as I've had occasion to say many many times, and
12 other judges of this Court have said many times, tilts, in the
13 case of white collar offenses like insider trading, towards
14 prison time. Because, first, these are crimes that it would
15 seem can be deterred by prison time in a way that some crimes
16 can't. Crimes of passion, for example, are less amenable to
17 deterrent value of prison time. Crimes committed by people who
18 have been to prison often may be less deterrable, except by
19 very severe prison time. But a sophisticated, calculating
20 white collar nonviolent defendant is presumptively just the
21 perfect person to deter by prison time. And that is true
22 whether it's Mr. Whitman or the man on the moon. It's not the
23 question of deterring him. It's a question of deterring
24 others. So those are some of the factors that I think you need
25 to address. There are other factors as well that we'll talk